Picus v. Wal-Mart Stores, Inc. et al Doc.

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DEL MONTE FOODS COMPANY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC.; MENU FOODS INC; DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA, INC.; and DOES 1 through 100, inclusive, Defendants.	Case No.: CV-S-00682-PMP-LRL **DEL MONTE FOODS COMPANY'S NOTICE OF MOTION AND PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** **(ORAL ARGUMENT REQUESTED)** **[FED.R.CIV.P. 12(b)(6)]** Complaint filed: April 30, 2007 Removal Date: May 25, 2007

TO ALL PARTIES OF RECORD AND THEIR COUNSEL:

NOW APPEARS, DEFENDANT, DEL MONTE FOODS COMPANY, (hereinafter "DEL MONTE") by and through its attorneys of record, Cozen O'Connor, and hereby moves this Court for an Order to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) without leave to amend on the following grounds:

1. Plaintiffs have failed to state a claim under the Federal Trade Commission Act or regulations because there is no private right of action for individual plaintiffs under the Federal Trade Commission Act or regulations. Consequently, all claims in Count I of the

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Complaint for deceptive trade practices asserted under the Federal Trade Commission Act or regulations must be dismissed for failure to state a claim upon which relief can be granted.

2. Plaintiffs have failed to state a claim for restitution, disgorgement and/or injunctive relief under the Nevada Deceptive Trade Practices Act because the statute on which Plaintiffs rely do not authorize such remedies, but instead limits a private plaintiff to actual damages sustained, costs and attorneys fees. Assuming *arguendo* that Plaintiffs ultimately prove a case, Plaintiffs are not entitled to disgorgement, restitution or injunctive relief demanded in the Complaint.

3. Plaintiffs have failed to state a claim for which unjust enrichment because Ms. Picus has pled an adequate remedy at law and because she has pled the existence of a product recall in which the product could be returned and the purchase price refunded which averments defeat the essential element of a claim for unjust enrichment. Having pled that Defendant did not retain a benefit from the pet food transaction, Plaintiffs' allegations fail to state a claim for unjust enrichment under Nevada law.

4. Plaintiffs have failed to state a claim for deceptive trade practices under the statutory laws of the states of California, Arkansas, Alabama and Delaware. Ms. Picus has failed to plead facts showing that these states have the minimum contacts with the Plaintiffs' pet food transaction to justify application of those state's laws to the Plaintiffs' pet food purchase in Henderson, Nevada. As the requisite minimum contacts were not pled, Ms. Picus has failed to state a claim for relief under the statutory laws of the states of California, Arkansas, Alabama and/or Delaware.

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This Motion to Dismiss will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities, the exhibits thereto, the Proposed Order filed herewith, the papers, records and pleadings on file in this action, and the argument of counsel at the hearing of this Motion.

DATED: June 13, 2007

COZEN O'CONNOR

By: [signature]

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